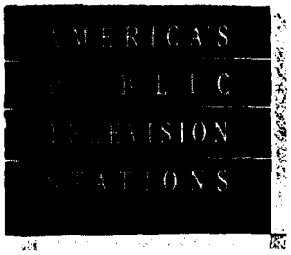

PBS

December 16, 1997

BY MESSENGER

Ex Parte Presentation

Ms. Rebecca Arbogast
Senior Legal Advisor
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-25, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992

Dear Rebecca:

At our meeting on December 3, 1997, we discussed the issue of whether the Commission should import aspects of the cable leased access scheme into the regulations it promulgates under the DBS provisions of the 1992 Cable Act. We are submitting this filing to further clarify our position on this issue. Time Warner and other cable operators argue that the entire leased access regime should be imposed on DBS providers so that DBS will be subject to the identical regulatory burdens Congress has imposed on cable. Other commenters argue that the Commission should borrow from the cable leased access scheme by imposing a "first come, first served" principle of allocation for programmers seeking access to the DBS set-aside capacity. These suggestions are misguided and should be rejected.

There is no basis for importing the cable leased access scheme into the Commission's regulation of DBS. Cable and DBS are very different technologies. Most obviously, DBS has a national audience, while cable is an inherently local service. The DBS industry is composed of several large, nationwide companies, while thousands of local cable systems serve communities around the country. Congress plainly understood that it was inappropriate simply to graft cable laws and regulations onto DBS; the statutory provisions governing cable and DBS are obviously quite different on their face. In the 1992 Cable Act, Congress gave the Commission authority to fashion a regulatory scheme tailored to the new and unique DBS technology.

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Certainly there is no indication that Congress wished to apply the cable leased access model to DBS. The legislative history of the 1992 Cable Act indicates that Congress perceived then that the cable leased access provisions, originally enacted in 1984, had largely been a failure.[1] Nothing in the legislative history of the DBS provisions suggests that Congress saw the DBS set-aside as similar to cable leased access. The portions of the legislative history relating to the DBS provisions do not even refer to the cable leased access scheme.

It is true that the DBS provisions include a sentence stating that DBS providers are barred from exercising editorial control over video programming provided for the set-aside capacity and that there is similar language in the cable leased access statute. This does not mean that the Commission should assume Congress intended the FCC to apply the two provisions in the same way. In the first place, there is a significant difference in the language of the two provisions. That difference suggests that the "editorial control" sentence in the DBS statute has a narrower scope than the provision in the cable leased access statute.[2]

The term "editorial control" can have different meanings in different contexts. In some contexts, the term refers merely to control over the content of programming (e.g., the ability to modify a program), not to control over which programmers will have access to particular capacity. In the television business, it is

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[1] See, e.g., S. Rep. No. 102-92, 102d Cong., 1st Sess. 30 (1991) ("[the cable leased access] provision has hardly been used"). See also id. (quoting statement of Preston Padden) ("Unfortunately, [the leased access] section of the Act has proven to be absolutely useless in seeking to advance the objectives of assuring consumers access to the widest possible variety of video sources and services.").

[2] The provision in the cable leased access statute is considerably broader than the sentence in the DBS statute. A cable operator not only may not exercise editorial control over video programming provided pursuant to the leased access statute; it may not "in any other way consider the content of such programming," except for the purpose of establishing a reasonable price for the use of the leased capacity. 47 U.S.C. § 632(c)(2). The DBS statute does not contain the "in any other way" phrase.

It is likely that Congress inserted the "in any other way" language to make clear that a cable operator is barred not just from altering the content of programming provided for the leased capacity, but also from choosing among programmers based on the content of their programming (except for pricing purposes).

common for program distribution agreements to contain "no editing" covenants, under which the distributor agrees not to alter the content of programming made available to it under the agreement.[3] In this context, the restriction obviously refers to control over the content of the programming itself, not the selection of programmers.[4] It is certainly not unreasonable to conclude that Congress referred to this narrower meaning of editorial control in the DBS statute and did not intend to dictate a "first come, first served" approach to selection of programmers. Congress may also have been trying to prevent DBS providers from unduly influencing the content of noncommercial programming where such programming is produced through joint ventures or co-production arrangements.

Neither the DBS statute itself nor its legislative history indicates that the "no editorial control" sentence in the DBS statute refers to a "first come, first served" principle of allocation for the set-aside capacity.[5] In fact, the DBS legislative history

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[3] PBS routinely includes such "no editing" covenants in the program distribution agreements it enters into with DBS providers, just as the producers of PBS programs insist on the same clause from PBS.

[4] In addition, dictionary definitions of the term "edit" suggest that the term "editorial control" can have several different meanings. Thus, "edit" can mean not only to "select and compile," but also to "emend" or "revise" and "to alter, adapt, or refine." Webster's Third New International Dictionary of the English Language Unabridged 723 (1993). The Commission itself has used the term "editorial control" in the sense of revision, rather than selection. See, e.g., In the Matter of Closed Captioning and Video Description of Video Programming: Report and Order, MM Docket No. 95-176 (released Aug. 22, 1997), at ¶ 18 (noting that video programming distributors "will not be responsible for the captioning of programming that is not subject to their editorial control").

[5] In this respect, the DBS legislative history differs from the history of both the cable leased access statute and the public, educational, or governmental ("PEG") use provisions. The 1984 House report on the cable leased access legislation contains several paragraphs emphasizing that cable operators are not to consider the content of a programming service eligible to use the leased capacity except in connection with establishing the price for the capacity. H. R. Rep. No. 98-934, 98th Cong. 2d Sess. 51-52 (1984). The legislative history of the DBS statute contains no discussion of this sort. The 1984 House report also refers to public access ("PEG") channels as the "video equivalent of the speaker's soap box" and "available to all." Id. at 36. The legislative history of the DBS provisions contains no such characterizations. This is perhaps

suggests otherwise. Both the House and Senate bills provided for the creation of a study panel to make recommendations on various issues relating to DBS regulation. According to the committee reports, the study panels were to submit recommendations on, among other things, "methods and criteria for selecting programming for [the set-aside] channels that avoid conflicts of interest and the exercise of editorial control by the DBS service provider."[6] If Congress had intended that allocation of the set-aside capacity be on a "first come, first served" basis, there would have been no need for a study panel to recommend methods for selection of programming.[7] Ultimately, the conference committee removed the provision for a study panel and provided instead that the set-aside capacity should be made available "to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission." 1992 Cable Act, Section 25(b)(3).[8]

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because such a locally-oriented "soap box" would be a dubious use of a national technology.

Moreover, unlike the cable leased access statute (see 47 U.S.C. § 632(d), (e)), the DBS statute does not expressly prescribe judicial and administrative remedies for persons aggrieved by the failure to make reserved capacity available. This suggests that Congress did not envision that programmers would be able to assert an absolute right to be carried on the DBS set-aside capacity.

[6] S. Rep. No. 102-92, at 92; H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 125 (1992).

[7] A "first come, first served" approach would essentially amount to a common carrier obligation on the DBS provider. However, nothing in the DBS legislative history suggests that Congress intended to impose such common carriage obligations. To the extent the legislative history touches on this subject at all, it suggests that the Commission was not to take steps that would transform DBS providers into common carriers. See S. Rep. No. 102-92, at 92; H.R. Rep. No. 102-628, at 124 ("The Committee does not intend for the FCC, in formulating any additional public interest obligations, to impose retroactively common carrier status on any DBS system not regulated as a common carrier at the time such regulations are enacted.").

[8] The conference committee also (a) added the current "editorial control" sentence, and (b) eliminated a provision defining "public service uses" that had appeared in the House bill and substituted a list of entities that qualify as "national educational programming suppliers" eligible to use the set-aside capacity.

Thus, the statute delegates to the Commission the duty to decide on the appropriate methods for selecting programming for the set-aside capacity, within the limitations established in the statute. The Commission should not simply import criteria from another statutory scheme governing a very different technology. Rather, it should choose an approach that is tailored both to the overall policies underlying the 1992 Cable Act and to the unique characteristics of the DBS technology. These considerations do not support a "first come, first served" approach. Rather, at least at the outset, they argue in favor of permitting DBS providers, where demand exceeds supply of the set-aside capacity, to make the initial selection among qualified "national educational program suppliers."[9]

Section 2 of the 1992 Cable Act states that it is the policy of Congress to "promote the availability to the public of a diversity of views and information," and to "rely on the marketplace, to the maximum extent feasible, to achieve that availability." 1992 Cable Act, Section 2(b)(1), (2). Allowing DBS providers to select among the group of qualified programmers described in the statute would be far more consistent with reliance on the marketplace than imposing a "first come, first served" regime.

In addition, the national character of DBS dictates a selection principle other than "first come, first served." DBS has a national footprint, and Congress envisioned that the set-aside capacity would carry programming with national appeal.[10] The local "soap box" approach that may be appropriate for cable leased access channels

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[9] At least at this stage, it does not appear that permitting DBS providers to select among qualified programmers is likely to result in abuses. Congress has described specifically in the statute the categories of programmers that are entitled to use the set-aside capacity. Unless the Commission chooses to expand these categories (which we believe would be contrary to congressional intent), there will be clear constraints on the choices made by DBS providers for the set-aside capacity. Moreover, because (unlike the situation under the cable leased access statute) commercial programmers are not eligible to use the DBS set-aside capacity, there is less reason to expect that a DBS provider would discriminate against certain programmers for anticompetitive reasons. If experience eventually showed that DBS providers were selecting programmers for the set-aside capacity in a manner that undermined congressional intent underlying the set-aside provisions, the Commission could adopt a different approach.

[10] Congress used the term "national educational programming suppliers" to describe the entities qualified to use the set-aside capacity. 1992 Cable Act, Section 25(b)(3), (5)(B) (emphasis added).

would be inappropriate for a national DBS service. Congress clearly created the set-aside capacity with the expectation that it would be used to carry valuable educational programming that would provide significant benefits for the American public. A "first come, first served" approach would likely defeat this expectation. This approach could fill the set-aside capacity with a collection of fragmented programming segments reflecting individualized interests that may or may not appeal to a national audience.[11] The result would be to turn the set-aside capacity into an unwatched wasteland, rather than the vital educational resource that Congress anticipated. Allowing DBS providers to make the initial selection among qualified programmers based on what is likely to appeal to a broad DBS audience is more likely to result in successful set-aside programming, thereby realizing Congress's goals for the set-aside capacity.[12]

In our earlier filings, we expressed the view that there should not be an undue delay in the effective date of the DBS regulations. However, the Commission should provide for a sufficient phase-in period so that DBS providers and qualified programmers can negotiate mutually satisfactory carriage agreements and prepare for distribution. Based on the recent experience of PBS, it appears that a phase-in period of between six and nine months would provide the parties with a reasonable amount of

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[11] In particular, it is unlikely that the set-aside capacity could be used effectively for instructional purposes (e.g., through carriage of substantial blocks of high quality programming with nationwide appeal) if the "first come, first served" regime were adopted.

[12] While a "first come, first served" regime may appear to offer the advantage of administrative simplicity, there would undoubtedly be many issues that would need to be resolved in connection with this approach. Among other things, it would be necessary for the Commission to decide what steps a programmer would need to take in order to obtain priority to use the set-aside capacity, whether negotiation of a satisfactory carriage agreement would be a prerequisite to obtaining such priority, and when, if ever, a programmer with limited appeal to the DBS provider's audience could be ousted in favor of others behind it in line. Ultimately, relying on DBS providers to select among qualified programmers is likely to be a simpler and more equitable approach.

time to negotiate and execute carriage agreements and begin distribution of new services designed for the set-aside capacity.

Respectfully submitted,

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